No. 83-1066

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

JACK REILLY'S, INC., D/B/A JACK'S,
PETITIONER,

v.

VIRGINIA THURBER,
RESPONDENT.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

A. Whether the definition of "employer" in Title VII of the Civil Rights Act of 1964 includes a corporation who employs fifteen regular part time employees although each employee is not required to report for work every working day.

B. Whether the district court properly exercised its pendent jurisdiction authority to ajudicate an identical cause of action arising under the state anti-discrimination statute.

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VIRGINIA THURBER,
RESPONDENT.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Statement of Case.

Respondent adopts, for the most part, the statement of the case presented by the petitioner. The respondent directs the Court's attention to certain omissions contained in petitioner's statement.

During the period of respondent's employment the petitioner's place of business was open 16 hours per day, seven days a week. The petitioner employed a regular full and part-time staff of 15 or more employees, who worked a substantial majority of the weeks in each calendar year and were paid a Christmas bonus by the petitioner. The employees were neither seasonal nor temporary workers. It was the respondent's full time employment. She was not a student. (Petition, Appendix at 24a; Court of Appeals Appendix, at 16-18, 29-30, 39.)

The petitioner openly discriminated against the respondent by repeatedly refusing to promote her to the higher paying job of bartender, despite her superior qualifications and seniority. (Petition, Appendix 14a.) When respondent continued to press her request for promotion the petitioner constructively discharged her by altering and reducing her work hours. (Petition, Appendix 14a.)

The petitioner also neglected to state that a finding in respondent's favor was entered by the District Court on Count II of her amended complaint charging a violation of Massachusetts General Laws, c. 151B *et seq.* (Petition, Appendix 13a-14a.) Chapter 151B is the state counterpart of Title VII, prohibiting discrimination in the terms and conditions of employment based on the gender of the employee. Jurisdiction of the state claim was asserted under the pendent jurisdiction doctrine.

The issue of the propriety of the district court's assertion of pendent jurisdiction was briefed and argued by both parties before the Court of Appeals. Finding in favor of the respondent on the federal claim, the Court of Appeal's opinion did not discuss the state claim contentions.

Summary of Argument.

Regular part-time employees have been included in establishing the jurisdictional threshold of Title VII coverage by every district and appellate court which has passed on this issue since 1975 (p. 4). This unanimous judicial opinion is unequivocally supported by the language of the statute, administrative rulings, and the legislative sources of Title VII which were adopted from other remedial acts encompassing part-time workers within their coverage (pp. 4-8).

The First Circuit's opinion will not lead to increased litigation on the jurisdictional issue (pp. 8-9).

Adoption of the petitioner's interpretation would be patently inconsistent with Congressional policy and Title VII's intent to eliminate gender based discrimination in employment, and would encourage employers to manipulate work schedules to avoid the Act's prohibitions (pp. 9-11).

It would be inappropriate to grant the petition as it is mooted by the district court's entry of judgment against the petitioner under a parallel state anti-discrimination statute pursuant to its pendent jurisdiction authority (pp. 11-14).

Argument.

I. The First Circuit Properly Interpreted the Statute to Include Regular Part Time Employees Who did not Report to Work Each Day.

A. *The Opinion of The Court of Appeals is Consistent With All Judicial and Administrative Precedents.*

Respondent's contention that the term "employee" in § 701(b) of Title VII, 42 U.S.C. § 2000(e)(b), includes only persons "at work" each day has been rejected by every court which has considered it. See, *Armbruster* v. *Quinn*, 498 F.Supp. 858, 861 (E.D. Michigan, N.D., 1980) rev'd on other grounds 711 F.2d 1332, 1334 (6th Cir. 1983); *Hornick* v. *Borough of Duryea*, 507 F.Supp. 1091, 1097 (M.D.Pa. 1980), *Pedreyra* v. *Cornell Prescription Pharmacies*, 465 F.Supp. 936, 941 (D.Colo. 1979), *Pascutoi* v. *Washburn-McReavy Mortuary*, 11 F.E.P. 1325 (D.Minn. 1975). See also, *Dumas* v. *Town of Mount Vernon, Ala.*, 612 F.2d 974, 929 n.7 (5th Cir. 1980); *Stratton* v. *Drumm*, 445 F.Supp. 1305, 1312 (D.Conn. 1978). The First Circuit's decision thus reflected unanimous judicial opinion when it stated that there was "no basis in authority, canons of statutory interpretation, legislative history or public policy to support the [petitioner's] position." (Petition Appendix at 26.) The concurrence of judicial opinion is further supported by the opinions of the enforcing administrative agency (E.E.O.C. General Counsel Opinion, October 18, 20, 1966, Fair Employment Practice Manual, 411:54 B.N.A. (1976)) and treatise commentators. Larson, *Employment Discrimination*, § 5.32 (Matthew Bender & Co. 1973).

B. *The Legislative History of Title VII Lends No Support to Petitioner's Construction of the Statute.*

Examination of the Congressional debates preceding enactment of Title VII only serves to further undermine the petitioner's position. After full briefing by the parties below, the First Circuit correctly concluded that "the legislative history generally weighs heavily against the appellant's position." (Petition, Appendix at 25a.) In particular, the court below noted that the definition of "employer" in Title VII was purposefully borrowed from the Unemployment Compensation Act (26 U.S.C. § 3304 (1954)). For nine years prior to enactment of Title VII, the Internal Revenue Service had ruled that the Unemployment Compensation Act included part time employees regardless of whether the employees reported to work each day.[1] Rev. Rule 55-19, Regulation 107, § 403.215 (1955). The Court properly presumed that Congress intended to include the same class of part time workers in defining an "employer" under Title VII as was utilized in similar remedial legislation. *Canon* v. *University of Chicago*, 441 U.S. 677, 694-696 (1979).

No reference to the Congressional debates cited by the petitioner to this Court, or to the courts below, supports its exclusion of regular part time employees from jurisdictional con-

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[1] It has been recognized that the National Labor Relations Act (29 U.S.C. § 152) was "the model for Title VII's remedial provisions." *Teamsters* v. *United States*, 431 U.S. 324, 366 (1977). Section 152(3) has been interpreted to count regular part time workers for the purpose of establishing the minimum number of employees necessary to invoke the Acts' protection. See, e.g. *Sears, Roebuck & Co.*, 193 NLRB 48, 78 LRRM 1249 (1971) (part timers who worked only four hours per week); *Stockham Valve and Fittings*, 222 NLRB No. 19, 91 LRRM 1263 (1976). The standard utilized in these cases is the regularity of employment, not the employees' actual daily appearance at work. *University of New Haven*, 190 NLRB No. 102, 77 LRRM 1273 (1971) (part time professors); *Dining & Kitchen Administration*, 257 NLRB 46, 107 LRRM 1514 (1981) (students who were employed in student cafeteria).

sideration. The First Circuit succintly concluded its analysis of the legislative history by stating that there was "nothing in the record" to give credence to petitioner's "unsupported assertion" of Congress' intent in inserting the "working day" clause. (Petition, Appendix 25a.)

C. *The Interpretation Adopted by the Court Below Does Not Ignore the Language of the Statute or Violate Canons of Construction.*

The petitioner's interpretation of § 2000e(b) is not supported by the clear language of the statute. Petitioner's misconstruction is derived only after it grafts the words "at work" onto the "each working day" phrase. Had that been the Congressional intent, the Act would simply have defined the term "employee" as a person who reported to work each day. Section 2000e(f) defines an "employee" simply as "an individual employed by an employer," thereby evidencing a legislative desire not to exclude part time employees in determining the Act's jurisdictional limits. Cf., *United States* v. *Turkette*, 452 U.S. 576, 580-581 (1981); on remand 656 F.2d 5 (1st Cir. 1981), wherein the Court held that the term "enterprise" under the RICO ACT (18 U.S.C. § 1961(4)) included both legal and illegal enterprises in light of the absence of any such distinction in the statutory definition.

Grafting additional words into § 2000e(b) is not required in order to give proper effect to literal terms of the provision. The "working day" phrase was inserted to resolve potential jurisdictional ambiguities, but for purposes far different than those suggested by the petitioner. These purposes can best be discerned by considering the effect of deleting the disputed phrase from the provision.

Deletion of the phrase "for each working day" would redefine a Title VII "employer" as one who had 15 or more em-

ployees in each of 20 weeks. One function of the omitted phrase was to clarify the statutory coverage of businesses which operate only during part of a week in each week of the 20 week period. Section 2000e(b), as enacted, includes those part time operators so long as they employ the required number of persons on the days of the week they are open for business. This interpretation of the "working day" phrase was adopted by the Equal Employment Opportunity Commission in a decision holding race-track operators to be employers, as they employed more than twenty-five drivers on the one day during the week their business was operated, race day. Decision No. 71-2088, 3 F.E.P. 1104, 1105 (1971) (pre-1972 amendment under which 25 was the minimum number of employees).

The deleted definition above would create further ambiguites in the Act's coverage of businesses compelled to hire temporary employees for limited terms or purposes. The "for each working day" language imports a continuity requirement in the employment relationship before Title VII jurisdiction can be asserted. The phrase thus operates in a balanced manner, excluding from consideration proprietors hiring temporary substitute workers, while including those, like the petitioner, who rely on numerous regular part time employees to meet the consistent demands of their business activities.[2] Compare, *Takeall* v. *Werd, Inc.*, 23 F.E.P. 947, 948 (M.D.Fla. 1979) (excluding temporary workers hired to fill in for vacationing employees) with cases cited *infra* at 3.

The lower court's construction, which foregoes Title VII jurisdiction in response to temporary increases in an employer's workforce, yields significantly different results than petitioner's proposal to exclude employers who have a regular

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[2] The Court below found: "*In order to remain open seven days a week*, Jack's maintained more than 15 employees on the payroll. . ." (emphasis added). (Petition, Appendix at 24a.)

workforce of 15 or more employees even though, by employer preference or job structure, each worker does not report to work every day. The interpretation adopted by the First Circuit gives effect to all the words of the section without excluding a significant part[3] of the national workforce from the protection of the most significant federal anti-discrimination legislation ever enacted.

D. *The Lower Court's Ruling Will Not Have a Negative Impact on the Judicial Docket or Small Business Employment Practices.*

The petitioner's suggestion that the First Circuit's opinion leaves employers with a confused jurisdictional standard resulting in unnecessary litigation and crowded dockets cannot be seriously entertained. Since the 1975 decision in *Pascutoi* v. *Washburn-McReavy Mortuary*, *supra*, only two other federal district courts have been called on to consider the issue, and only in the case at bar has an employer pursued any appeal. Respondent's counsel, in effect, conceded below that the issue was "cut and dried" against them. (Opposition, Appendix 2a.)

Employers will have no problem in determining which employees are regular part time employees and which are temporary workers hired only to fill in on an infrequent basis. It must be assumed that employers have been making that distinction, pursuant to compliance with the Unemployment Compensation Act, for over two decades prior to the First Circuit's decision in this matter. Moreover, the opinion below

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[3] Almost one-half of the workforce are women, who also comprise approximately 65% of the total number of part time workers nationwide. Employment and Earnings Bulletin, April 1983, United States Department of Labor, Bureau of Labor Statistics, at page 45, Table 29.

specifically differentiates between regular part time employees and "occasional help" hired for "isolated" days. (Petition, Appendix at 25a.)

The proposition that businesses will cut part time workers from payrolls in order to avoid the effect of the First Circuit's opinion cannot stand up to even cursory scrutiny. Employers hire regular part time workers for economic reasons. As the petitioner in this case, they may run their operations on seven-day, double-shift schedules which could not possibly be filled by full time employees on a regular basis.[4] "Requiring each [employee] to work an extraordinary amount of hours per week"[5] is a facetious suggestion since state and federal employment laws and union contracts make such overtime voluntary, compensable at rates which would make it uneconomic, and illegal where health and safety factors are concerned. The only effect of the decision below on employment relations will be to continue to insure that part time workers are not victims of discrimination.

E. *Considerations of Public Policy and Concern for the Effective Enforcement of the Act Compel Adoption of the Opinion Below.*

The Supreme Court has ruled in cases arising under the National Labor Relations Act[6] and the Social Security Act[7] that the term "employee" when used in social and labor legislation

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[4] The petitioner's assertion that it could have replaced its part time employees with a full time staff who would have worked "every shift, every day" (Petition at 8) is a human impossibility given the seven day per week, 16 hour per day schedule under which it chose to conduct business. The petitioner's hiring of part time workers was not an altruistic decision to benefit college students, but rather an economic one predicated on its operation schedule.

[5] Petition at 8.

[6] 29 U.S.C. § 151 *et seq.*

[7] 42 U.S.C. § 1104 *et seq.*

should be interpretated primarily in light of the remedial purpose intended to be achieved under the statute. *Board* v. *Hearst Publications*, 322 U.S. 111, 124 (1944), *United States* v. *Silk*, 331 U.S. 704, 715 (1947). Similar expressions of the necessity to construe Title VII consistently with its remedial purpose have also been set forth on many occasions. See, e.g. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-45 (1974); *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 398-399, (1982). In a different context, two other circuit courts have adopted an interpretation of the term "employee" in § 2000e(b) to effect the remedial purpose of the Act. *E.E.O.C.* v. *Zippo Mfg. Co.*, 713 F.2d 32, 36-37 (3d Cir. 1983); *Armbruster* v. *Quinn*, 711 F.2d 1332, 1336-1337 (6th Cir. 1983). The Court in *Armbruster* noted with approval the district court's inclusion of part time employees in determining the jurisdictional threshold. *Id.* at 1334.

The inclusive definition of "employee" adopted by the lower Court is consistent with this line of authority effectuating the legislative intent to prohibit discrimination in employment. The decision below extends Title VII protection not only to part time employees but also to their full time co-workers. The petitioner's interpretation of the statute contradicts Congress' concern to provide protection for the potential victims of discrimination. Large and medium sized employers might easily take advantage of loopholes created by the petitioner's argument, thereby totally avoiding Title VII's prohibitions.

As an example, the revocation of laws prohibiting retail stores from operating on Sunday[8] has encouraged many businesses to operate on a limited basis for seven days per week. An employer with a six day work force of 30 persons per day who opened on Sunday with a reduced workforce of 14 employees could adopt the petitioner's logic and discriminate against all

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[8] See, e.g. M.G.L. c. 136, § 6, c. 556 Acts of 1982.

employees free from Title VII's restrictions. Employers with a large workforce might reduce their staff to 14 people for only one day in each of 20 weeks, claiming the requisite minimum number of persons were not on the job site for each day of the statutory period.

To permit such results would encourage employers to manipulate their work shifts with the express purpose of evading Title VII coverage. It would also engender a pattern of non-uniform enforcement, varying according to state work laws and employer preferences. The consequences described in these two simple examples are manifestly inconsistent with the statutory intent and effective enforcement of the Act, and their absurd results must be rejected. *U.S. v. Amer. Trucking Assn's*, 310 U.S. 534 (1940); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978).

In light of the undisputed remedial intent of the Act and the enforcement difficulties engendered by petitioner's position, it was correct for the First Circuit to adopt an interpretation which included regular part time employees in the jurisdictional determination. The Court recognized that its holding might on rare occasion effect a truly small business. Where, however, the minor burden placed on a subject business is only to avoid discriminatory employment practices, the opinion struck a proper balance in favor of the well established inclusive definition. (Petition, Appendix at 26a.)

II. Allowance of the Petition Would be Improvident as the Decision Below Rests on a Pendent State Claim Which Would not be Disturbed by this Court's Dismissal of the Title VII Cause of Action.

The respondent's complaints of gender based discrimination was tried in the district court pursuant to claims arising both

under Title VII and the parallel state anti discrimination statute, M.G.L. c. 151B. (Petition Appendix 13a, 14a.) The only relevant distinction between these complimentary Acts is the state statute's jurisdictional requirement of a minimum of six employees[9] as compared to the federal minimum of 15 employees. Even accepting petitioner's "at work" test, it concedes it employed a minimum of seven employees each day during respondent's term of employment. (Petition at 3.)

The district court adjudicated and entered judgment in respondent's favor on the state claim in accordance with the proper exercise of its pendent jurisdiction authority. (Petition, Appendix at 13a-14a.) The trial court found there was complete identity of issues under both Acts based on the facts presented at trial. (Petition, Appendix at 15a.)

The petitioner made only a limited argument on the pendent jurisdiction issue to the First Circuit on appeal. The district court's holding that it was appropriate to exercise its discretionary power to adjudicate both interrelated claims was not challenged.[10] Neither did it present any contention that it suffered any actual prejudice in the trial of the combined counts. The petitioner's appellate argument was confined to the proposition that dismissal of the Title VII count on jurisdictional grounds compelled vacation of the pendent claim judgment as it was dependent upon the "insubstantial" federal claim. The First Circuit's affirmation of the Title VII cause of action temporarily mooted the state claim issue.

The First Circuit's opinion must sound the death knell for the petitioner's characterizations of respondent's Title VII claim as "insubstantial." In the context of discussing the sub-

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[9] M.G.L. c. 151B, § 4(1).

[10] Petitioner conceded that the "common nucleus of operative fact" test of *Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966) was met. (Petitioner's Brief, Court of Appeals, at 25.)

stantiality of a constitutional claim necessary to justify pendent jurisdiction this Court has provided a controlling standard:

> claims are constitutionally insubstantial only if the prior dec ions inescapably render the claims frivolous; prev decisions that merely render claims of doubtful or q ionable merit do not render them insubstantial. . . .

Hagans v. *Lavine*, 415 U.S. 528, 537-538 (1974). It is appropriate to apply that same standard to evaluate the substantiality of federal statutory claims to which a pendent state cause of action is bound. *Jackson* v. *Stinchcomb*, 635 F.2d 462, 471, (5th Cir. 1981); *Tedford* v. *Massachusetts Housing Finance Agency*, 522 F.Supp. 508, 510 (D.Mass. 1981), aff'd without opinion, 676 F.2d 682 (1st Cir. 1982). The legislative, judicial and administrative authority presented to the courts below by the respondent fully justified their concluding a substantial federal question was at issue.

Even if the petitioner was ultimately successful in vacating the First Circuit's holding on the Title VII claim, the Court below would be virtually compelled by a pervasive line of authority to affirm the district court's exercise of pendent jurisdiction. See, *Hurn* v. *Oursler*, 289 U.S. 238, 246 (1933); *Strachman* v. *Palmer*, 177 F.2d 427, 430-433 (1st Cir. 1949); *Telechron, Inc.* v. *Parissi*, 197 F.2d 757, 762-763 (2d Cir. 1952) holding that denial of a federal claim *at trial* does not limit the Court from entering final judgment on the merits of the pendent cause of action. The considerations of judicial economy and convenience which justify these holdings have also led a substantial number of courts to uphold the exercise of pendent jurisdiction even where the federal statutory claim has been dismissed *prior to trial*. See, e.g., *Rosado* v. *Wyman*,

397 U.S. 397, 405 (1970), *State of N.D.* v. *Merchants Nat. Bank & Trust Co.*, 634 F.2d 368, 371 (8th Cir. 1980); *Gray* v. *International Ass'n of Heat and F.I. & A.W.; L. No. 51*, 447 F.2d 1118, 1120 (6th Cir. 1971); *Ryan* v. *J. Walter Thompson Company*, 453 F.2d 444, 446 (2d Cir. 1971), cert. denied, 406 U.S. 907 (1972).

The rationale of these precedents must surely apply with even greater force to a case commenced in 1977 and affirmed on appeal in 1983. The lapse of the statute of limitations[11] on the state claim would render a post appellate dismissal of that cause of action patently unjust. See, *Pharo* v. *Smith*, 625 F.2d 1226, 1227 (5th Cir. 1980) holding that expiration of statute of limitation is a "determinative" factor in favor of accepting jurisdiction of a pendent claim. See also, *O'Brien* v. *Continental Illinois Nat. Bank & Trust*, 593 F.2d 54 (7th Cir. 1979). The petitioner's failure to appeal any finding of fact or conclusion of law, except subject matter jurisdiction, demonstrates the meritorious substance of the respondent's complaint of discriminatory treatment. Dismissal of her claims at this date would deny respondent the relief due her and render years of good faith litigation futile.

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[11] M.G.L. c. 151B, § 9 establishes a two year statute of limitation.

Conclusion.

For the reasons stated above, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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Appendix A

United States Court of Appeals For the First Circuit

No. 83-1024

VIRGINIA THURBER,
PLAINTIFF, APPELLEE,

v.

JACK REILLY'S, INC.,
D/B/A JACK'S,
DEFENDANT, APPELLANT.

Before
Coffin and Breyer, *Circuit Judges*,
and Skinner,* *District Judge*.

ORDER ON APPLICATION FOR FEE

Entered December 15, 1983

The successful plaintiff-appellee seeks an award of counsel fees under 42 U.S.C. § 2000(e)-5(k). Counsel has submitted a request for $6,885. representing 76.5 hours of work on the appeal at the rate of $90 per hour. The hourly rate is eminently reasonable in view of the skill and experience demonstrated by appellee's attorney in this case. We adopt it as the appropriate "lodestar". His 76.5 hours have been adequately accounted for.

* Of the District of Massachusetts, sitting by designation.

Appellant suggests that counsel's fee should be reduced because the issue was cut and dried, and all the precedents favored the appellee. If appellant concedes this point, we are unable to repress the suspicion that appellant put the appellee through the needless expense and effort of defending a frivolous appeal. Consequently, its attacks on counsel's billing procedure do not engage our sympathy.

The appellee shall be awarded her counsel fees in the amount of $6,885 plus $927 for the time spent on her reply brief and counsel's supplemental affidavit for a total award of $7,812.

So ordered.

By the Court,

Francis P. Scigliano
Clerk.

[Cert. cc: Clerk, U.S.D.C., Massachusetts, cc: Messrs. McNeill & Weinberg.]